No. 87-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF WISCONSIN,

Respondent,

v.

THOMAS D. TRUDEAU,
TRUDEAU DEVELOPMENT, INC.,
TRUDEAU CONSTRUCTION, INC.,
SUPERIOR DEVELOPMENT, INC.

Petitioners.

and

THE ASHLAND COUNTY BOARD OF ADJUSTMENT,
LARRY HILDEBRANDT, ASHLAND COUNTY
ZONING ADMINISTRATOR.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI

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December 3, 1987

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1. The state's description of the inlet's location and the water's source misstates the record.

As an initial matter, two mischaracterizations of the land involved in this case must be corrected. First, the state extensively describes the use of an inlet for trading purposes before Wisconsin became a state. This inlet, shown on the historian's map reproduced in both the petitioners' and the state's appendices, however, lay entirely on Section 31; the line crossing it on the map is a lot line,

not a section line. R. App. 102, an enlargement of Exhibit 27, a 1964 Geological Survey Map, also shows the inlet terminating well inside Section 31.[1] The state's historical evidence, therefore, merely shows that fur traders used an inlet on Section 31. The inlet was not on Section 32, where the petitioners' land is located.

Second, the state attempts both to minimize the importance of the source of the water and to exaggerate the presence of lake water. The water's source was made significant by the *state:* it relied on "water seeking its own level" as proof that the lake flooded the land. The state, however, proved that the site drained an area of Madeline Island. As shown on R. App. 102, the petitioners' land is approximately located in the shaded and unshaded area of Section 32 across the section line from the open water slough. Neither the boat basin nor the open water slough touched Section 32. The only testimony as to lake water on the site was of water from the marina, which on one occasion the state's witness saw being pushed through the culvert by the wind. In fact, the water may very well have been pushed uphill, as the state so emphatically denies. Thus, the evidence failed to conform to the state's theory: drainage water flowing into a lake is not proof that the lake has flooded the land.

Under the state's view, the case merely reaffirms the rule that, "the public is not divested of title to shallow, non-navigable portions of a navigable lake's bed when a road or bridge also restricting navigation is built across the non-navigable portion of the lake bed." *Id.* at 26.[2] The state, however, assumes a fact it failed to prove:

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[1]Appendices 101-103 are reproduced in the back of this brief and will be cited as "R. App." The separately bound Appendix to the Petition for Certiorari will be cited as "Pet. App."

[2]The state's brief focuses on an argument not raised in this Court: whether the petitioners had obtained title to the land under the doctrines of accretion and reliction. This alternative argument assumed, without conceding, that the site had been lake bed. In fact, the statement that the Wisconsin Supreme Court was responding to the petitioners' accretion and reliction arguments when it found that the lake has always flooded the site distorts the record. The finding was made in support of the court's holding that any portion of the site below 602 feet I.G.L.D. is lake bed. Pet. App. 12a-15a. The accretion and reliction arguments were dismissed in one paragraph. *Id.* at 12a.

there is no evidence that the lake, rather than drainage water, flooded the land before the marina was built. Thus, the marina did not cut off the lake's access to the land; to the contrary, it made it possible for lake water to be blown on the land. The state, therefore, may not rely on lake water blown through the culverts. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

2. Federal law predating the Constitution prohibits Wisconsin's claim to title under the public trust and equal footing doctrines to non-navigable water courses that drain into navigable waters.

The state mischaracterizes, rather than responds to the petitioners' arguments. Contrary to the state's assertion, the petitioners do *not* argue that "the public trust should extend only to the navigable portions of navigable water bodies like Lake Superior." State's Brief at 17-23; 29-30. There is no dispute that non-navigable areas within the boundary of a navigable body of water are included in the public trust. However, the petitioners do dispute the state's method for determining where the boundary lies. The petitioners' land is not public trust land because it is outside the public trust boundary.

Based on post-statehood evidence that the land was "hydraulically connected" to Lake Superior, the Wisconsin Supreme Court held that, at the time Wisconsin became a state, the public trust boundary of Lake Superior followed the banks of streams and wetlands that drained into the lake. Both Mississippi and Wisconsin claim title under the public trust and equal footing doctrines to non-navigable water courses that drain into a navigable body of water. As will be more fully explained below, an unbroken line of Congressional acts, beginning before the Constitution was ratified with the Northwest Ordinance and continuing through the surveying and sale of the public lands, excluded both inland and tidally influenced non-navigable streams from the public trust. This case, therefore, involves some of the same issues as *Phillips Petroleum Co. v. Mississippi*, (No. 86-870).

Defending the "hydraulic connection" test as settled law, the state argues that the petitioners seek to disrupt long standing principles. State's Brief at 29-33. Congress' intent to limit the public trust to waters that were navigable in fact is clear not only from the Northwest Ordinance (enacted before the Constitution was ratified) but also from the rules it adopted for surveying these lands. The system for surveying and selling the Northwest Territory required the surveyors to exclude land under navigable waters from the public lands available for purchase; lands under non-navigable streams or watercourses, however, were offered for sale:

> Sec. 9. *And be it further enacted*, That all navigable rivers, within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways: And that in all cases, where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both.

Act of May 18, 1796; 1 Stat. 464 at 468.

The state's "hydraulic connection" test clouds titles based on this survey system. To determine the quantity of land contained in a lot bordered by navigable waters, the surveyors meandered the winding course of the bank. *Railroad Company v. Schurmier*, 74 U.S. 272, 286-87 (1868). The meander lines, while not intended to be boundary lines, were accurate surveys of the meanderings of the watercourse. *Id.* at 273-74. Sections bordering on a meandered lake were fractional; that is, they were divided into irregular lots. *Id.* at 273-75. The meander lines were recorded in the surveyor's field notes and official plat maps were drawn based on these notes. Act of May 18, 1796, Sec. 2, 1. Stat. 464 at 466. These plat maps were incorporated in the federal patents. *Jeems Bayou Club v. United States*, 260 U.S. 561, 564 (1922).

R. App. 101, an enlargement of a portion of the original government survey map, shows the lake with an unbroken meander line on Section 31. Under the state's theory, the lake's meander line should have turned inland and encompassed the wetlands on

Sections 31, 32 and 29, as if this area were an arm of the lake. And, section 32, instead of being whole, should have been fractional. The federal patents to these wetlands inland of the meander line are void under the state's view. The state does not attack the survey as mistaken or as the product of fraud. Rather, the state relies on its new rule of law: the wetlands were part of the lake because they were hydraulically connected to the lake. A state, however, cannot defeat a federal patent by classifying waters as navigable in contradiction to the federal definition of navigability under which the patent was granted. *See Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922). It is the state, not the petitioners, which seeks to disrupt long-established property law.

Neither inland nor tidally influenced non-navigable streams were granted to the states by the public trust and equal footing doctrines. The intent to limit the public trust to waters navigable in fact is found in the Northwest Ordinance, which provided that navigable waters were to be common highways. This Court has held that the Continental Congress rejected the ebb and flow test when it adopted the Northwest Ordinance and specifically noted that this act predated the Court's decisions in *The Daniel Ball* and *The Propeller Genesee Chief;* this Court did not introduce the navigability in fact test. *Economy Light Co. v. United States*, 256 U.S. 113, 118-121 (1920) (commerce clause). This intent to exclude non-navigable waters was continued in the survey rules, providing that non-navigable steams were owned by riparians. In *Schurmier*, this Court held that navigable, as that term was used in the survey rules, meant navigable in fact and held that the Congress had rejected the ebb and flow test. 74 U.S. 287-89. The survey rules applied to the Northwest Territory were used to survey the Mississippi Territory. Act of March 3, 1803, 2 Stat. 229 at 233. When states with tidally influenced waters such as Mississippi were admitted, their navigable waters were also declared common highways. Act of March 1, 1817, 3 Stat. 349. The surveyors drew the boundary of a navigable body of water across the mouth of an intersecting body of water from headland to headland, not at the point of tidal influence. *Knight v. United States Land Association*, 142 U.S. 161, 187, 207 (1891). Thus, there is an unbroken line of Congressional acts excluding non-navigable streams from

the public trust. Congress, in disposing the public lands, did not sell the public trust lands. *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1893). Applying the navigability in fact test is not a retroactive deprivation of rights granted by the equal footing doctrine because the navigability in fact test has always determined the extent of the public trust lands.

3. The federal questions were fairly presented to the Wisconsin Supreme Court.

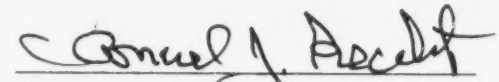
Whether the land was part of the public trust when Wisconsin became a state (which was raised not only by the petitioners but also by the state) was fairly presented to the Wisconsin Supreme Court. The petitioners cited the federal patent and the absence of fractional lots as proof that the lake had not covered the site before the marina was built. The state argued: "As of the date of statehood, however, Wisconsin obtained absolute title to the beds of navigable waters like Lake Superior which could not be defeated by a subsequent federal patent relating to any such lands." R. App. 103. The Wisconsin Supreme Court adopted the state's theory, thus holding that the lake flooded the land before statehood. In their Motion for Reconsideration, the developers noted the absence of proof that lake water naturally flowed to the site before the marina and the culverts were built, specifically argued that the Wisconsin Supreme Court could not evade their property rights by making findings without support in the record, and quoted *Carlson v. Curtiss*, 234 U.S. 103, 106 (1913).

Whether the "hydraulic connection" test deprived the petitioners' of their property rights was also fairly presented. The petitioners summarized the prior state law and argued that the "hydraulic connection" test materially deviated from this prior law. In their Motion for Reconsideration, the petitioners cited *Demorest v. City Bank*, 321 U.S. 36, 42 (1943) and reminded the Court that they could not evade federal rights with novel constructions of state law.

CONCLUSION

As shown by the numerous exhibits, the lands to which Wisconsin claims title were wetlands, which drained into a water course, which, in turn, drained into Lake Superior. The state's attempt to claim non-navigable streams and wetlands as part of the public trust lands it received at statehood, however, overturns property laws established by Congress, which excluded such non-navigable streams and watercourses from the public trust. Moreover, the "hydraulic connection" test radically departs from prior state law and deprives the petitioners of their property rights, derived from a federal patent. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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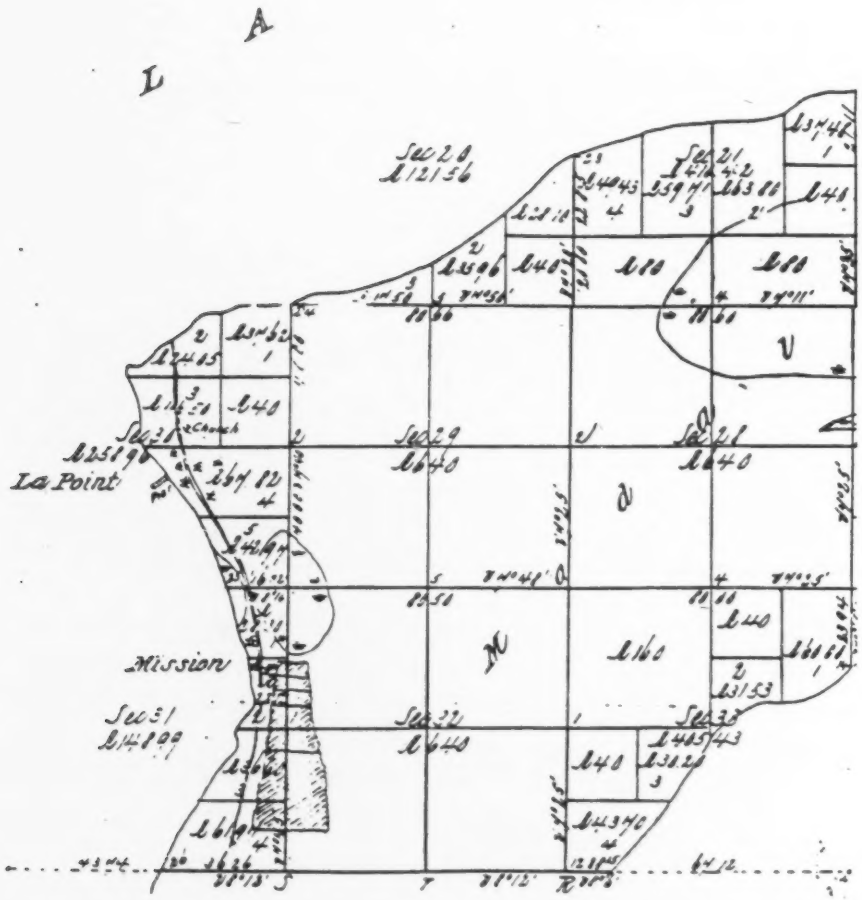
December 3, 1987

APPENDIX 1

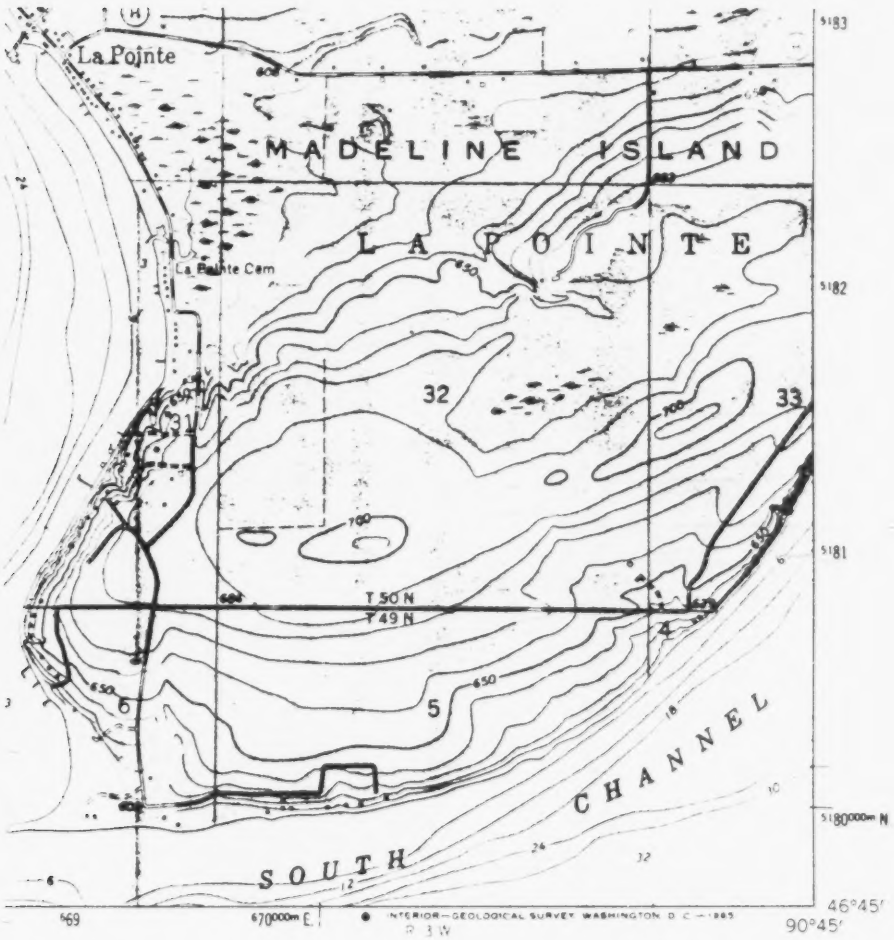
R. App. 101 (An Enlarged Section Of Exhibit 80, The Original Government Survey Map Drawn in 1852)



Total number of

Surveys Designated	By Whom Surveyed	Date of Contract	Amount of Surveys M Ch Lks	When
Township lines,	Elisha S. Rowe	May 24th 1852	15 . 09 . 16	August
Subdivisions	Elisha S. Rowe	May 24th 1852	45 . 28 . 74	Septem

APPENDIX 2
R. App. 102 (An Enlarged Section Of Exhibit 27, A 1964 United States Geological Survey Map)



ROAD CLASSIFICATION

Medium-duty ——— Light-duty ———

Unimproved dirt - - - - - - - -

State Route

QUADRANGLE LOCATION

BAYFIELD, WIS.
SE/4 BAYFIELD 15' QUADRANGLE
N4645—W9045/7 5
1964
AMS 2877 IV SE—SERIES V861

APPENDIX 3
R. App. 103 (State's Brief To The Wisconsin Supreme Court on The Patent And Survey)

D. The fact that the Developers submitted a chain of title to the site back to 1856 is irrelevant to the issue before the court.

The Developers refer[26] to the fact that they submitted proof of a chain of title to the site at trial in support of their argument that this site was never lakebed. The original federal patent to the site (Ex. 79) was dated April 1856, approximately eight years after Wisconsin became a state. As of the date of statehood, however, Wisconsin obtained absolute title to the beds of navigable waters like Lake Superior which could not be defeated by a subsequent federal patent relating to any such lands. *Or. Ex Rel. State Land Bd. v. Corvallis Sand & G.*, 429 U.S. 363 (1977). *See also Angelo v. Railroad Commission*, 194 Wis. 543, 550, 217 N.W. 570 (1928). In this context, the Developers also suggest that the absence of "fractional lots" on the original government survey means the site was not then lakebed.[27] The significance of that fact was addressed by the DNR engineer and surveyor who noted that original government surveys were not intended to outline the boundaries of navigable waters but instead were intended to set township and section lines and to estimate timber values (R. 41-46). Thus, neither the existence of the post-statehood federal patent nor the absence of fractional lots on the original survey detract in any way from the conclusion that the project site is lakebed.

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[26] Brief of Petitioners at 20.

[27] *Ibid.* at 20.